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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 507

IN THE MATTER OF

A. JOSEPH FATA, an Attorney,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

ANGELO T. COMETA,
Attorney for
Co-ordinating Committee on
Discipline, Respondent.

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York (hereafter referred to as "the Court of Appeals"), made and entered on May 20, 1965, which denied, without opinion, petitioner's motion for leave to appeal to the Court of Appeals.

Proceedings Below

On December 3, 1964, the Appellate Division of the Supreme Court of the State of New York, First Department (hereafter referred to as "the Appellate Division"), made and entered an order disbarring petitioner as an attorney. The Appellate Division's opinion is reported in 22 A. D. 2d 116.

Petitioner, thereafter, moved in the Appellate Division for leave to appeal to the Court of Appeals. The motion was denied unanimously by order dated March 9, 1965.

Thereafter, petitioner made an application in the Court of Appeals for leave to appeal to said Court. That motion was denied by order dated May 20, 1965. The decision of the Court of Appeals is reported in 15 N. Y. 2d 487.

Statement of Facts

Petitioner was admitted to practice on October 21, 1954. He was engaged in the practice of law in the First Judicial Department, from January, 1955 to the date of his disbarment. At the time of the filing of the petition herein, petitioner practiced law under the firm name of Fata & Fata, in partnership with his brother, Francis A. Fata, who was admitted to practice on October 21, 1954.

On November 10, 1961, the Appellate Division authorized the Committee to commence a disciplinary proceeding against both petitioner and his brother. The ten charges in the petition against both brothers were identical.

On January 5, 1962, Francis A. Fata resigned from the Bar. The Appellate Division entered an order on February 15, 1962, striking his name from the roll of attorneys and counsellors-at-law.

A. Joseph Fata elected to stand trial. The Referee appointed by the Appellate Division was the Hon. Sol Gelb, who in his report dated April 30, 1964, sustained all ten charges. The Appellate Division in its unanimous opinion confirmed the Referee's report and disbarred petitioner, effective January 3, 1965.

Petitioner's Contentions

This application is based on petitioner's allegations that he was denied his constitutional right of due process, which denial is based on the assertion that wrongdoing was imputed to petitioner and that there was no proof of his personal culpability for the acts of misconduct charged; that a partnership relationship between petitioner and his brother was not supported by the record, and that there was an illegal and improper use of the petitioner's photograph during the preliminary hearings.

ARGUMENT

In answer to petitioner's contentions, as summarized above, the following is submitted:

(1) Petitioner was given written notice by respondent of the institution of the preliminary investigation of his practice in the prosecution of personal injury claims prior to the interrogation of any witnesses by the Committee.

(2) The investigation was directed only to closed accident cases.

(3) Petitioner was granted the privilege of being represented by counsel of his own choice when he was interrogated during the preliminary investigation, and his counsel was present and participated in the preliminary hearings, even though this Court has held in *Anonymous 6 and 7* v. *Baker*, 360 U. S. 287 (1959), that in a preliminary investigation such as this, which is analogous to a Grand Jury investigation, counsel for an attorney may not be present in the hearing room during his client's interrogation.

(4) Witnesses other than petitioner who were interrogated during the preliminary investigation of petitioner's professional conduct were granted the right of counsel.

(5) Petitioner was permitted to obtain a copy of the transcript of his testimony given in the preliminary investigation.

(6) Petitioner has had his full day in court during the hearings held before the Referee. He was confronted with witnesses who testified against him; the rules of evidence were applied; he was given the fullest opportunity to cross-examine such witnesses and petitioner was given by respondent, each witness's prior testimony and exhibits in connection therewith for such purpose as he saw fit.

The disciplinary proceeding in question was instituted and conducted in accordance with the statutes and rules authorizing it; no substantial legal right of the petitioner was ignored or violated; no prejudicial error was committed in the reception or exclusion of testimony by the Referee; there was ample evidence to sustain the Referee's finding and to justify the order of disbarment.

The petition alleged ten charges of professional misconduct, all of which were sustained by Referee Gelb, who, throughout the hearings, gave the petitioner every opportunity to refute the specifications of professional misconduct. The Referee found petitioner's explanations insufficient and sustained all of respondent's charges.

Petitioner's Personal Misconduct

In addition to the charges established on the theory of partnership responsibility, the record is replete with proof of petitioner's personal participation in many instances of misconduct, as revealed by the testimony of the following witnesses who appeared before the Referee:

(1) Leonard Heles (S.M. 145-158)*

(2) Lacy Bristow (S.M. 5-53)

(3) Charles Jackson (S.M. 102-144)

(4) Edna McAllister (S.M. 647-698)

(5) Lindsay Williams (S.M. 259-273)

(6) Charles Robinson (S.M. 437-452)

(7) Michael Zaccardo (S.M. 716-761)

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* Page references are to the stenographer's minutes of the proceedings before the Referee.

Petitioner also admitted that he failed to obtain orders of compromise in a case involving three infants (S.M. 861); and that he failed to give clients copies of Closing Statements as required by the Rules of the Court (S.M. 862-863).

Petitioner's Photograph

Petitioner contends that it was illegal and improper to use his photograph in the preliminary investigation without also displaying to the witness photographs of his brother, Francis A. Fata,* and his office associate, John F. Andreuzzi.** In answer to such contention, it is submitted that there were some thirty-eight witnesses who gave testimony during the preliminary investigation, at which time petitioner's photograph was exhibited to five of the thirty-eight. During the hearing before the Referee, which testimony is controlling here, petitioner's photograph was offered in evidence by *petitioner's* attorney (Res. Ex. M; S.M. 710), but was not used by the Committee's trial counsel. Of utmost significance, moreover, is the identification of petitioner by his former clients who are named above, and designated (1) through (7).

Existence of Partnership

The Referee rejected the petitioner's attempt to insulate himself from responsibility on the theory that there was no partnership but only a joint venture.

The record contains documented proof evidencing the incidents of partnership, including a partnership bank ac-

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* Resigned from the Bar, *supra*, p. 3.

** On March 16, 1962, John F. Andreuzzi's name was stricken from the roll of attorneys and counsellors-at-law, after his execution of a resignation from the Bar.

count, executed partnership certificates, bank signature cards signed as partners and copies of U. S. Partnership Tax Returns of Income filed for the years 1955 and 1957 through 1959. In the light of this evidence, the Referee found petitioner's position regarding the non-existence of the partnership "absurd" (Referee Gelb's report, page 7). This finding of the existence of a partnership is supported by petitioner's admissions during the hearing before the Referee, that in describing his relationship with his brother, he may have used the term "partnership" or "partner" to clients or to others (S.M. 421) and that they had formed their partnership in 1955 (S.M. 962, 963).

The Law at Issue

The law applicable to the conduct of a disciplinary proceeding, the quantum of proof and the degree of discipline, is clearly stated in *Matter of Flannery,* 212 N. Y. 610:

> "Per Curiam. The Appellate Division has found the appellant guilty of gross unprofessional conduct and has decreed his disbarment. On this record our power of review is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it. (*Matter of Goodman,* 199 N. Y. 143; *Matter of Robinson,* 209 N. Y. 354.) It is not for us, where the evidence is conflicting, to determine where lies the truth. It is not for us, where opposing inferences may be drawn, to determine which we shall accept and which reject. It is not for us to revise the measure of punishment which guilt, when adjudged, is to entail. In establishing the standard of conduct to which the bar must at its peril conform, the Appellate Division has a wide discretion, with which we have neither the wish

nor the power to interfere. If the conduct condemned is not wholly blameless, the extent to which it shall be reprobated is not for our determination. We have no right to say, where any measure of blame attaches to the offense, that the standard has been set too high.

In the light of these guiding principles we have considered this voluminous record, and have reached the conclusion that the evidence sustains the findings. It would serve no useful purpose to follow the course of the proofs and to point out the inferences to be drawn from them. The court below, where conflicting inferences may have been possible, has seen fit, after weighing the evidence, to draw those adverse to the appellant, and to the rectitude of his purposes and motives. Drawing these inferences it has held that his conduct falls short of the standard to which the members of an honorable profession must conform. The appellant would have us say that the conduct which the court below has thus condemned is wholly free from blame. We are asked in effect to serve notice on the bar that what was done by the appellant may with impunity and honor be done by others. We canot give that word.

The order of disbarment should be affirmed."

The record of the hearing amply supports the charges specifying petitioner's personal misconduct. (*Matter of Turchin,* 10 N. Y. 2d 959; *In re Goldstein,* 265 App. Div. 935; *In re Cook,* 242 App. Div. 224; and *In re Lynch,* 227 App. Div. 477, all cited by petitioner on page 24 of his brief, are without relevance to the instant application. In each of these four cases, the quantum of evidence was in dispute, and the courts found that the evidence did not warrant the disciplinary measures exacted.) As the Ap-

pellate Division, in its opinion disbarring petitioner stated (p. 117): "In a firm handling the number of negligence cases that Fata & Fata did, respondent was under a duty to know what was going on; and the Referee found that respondent's claim of ignorance was incredible. Respondent's rejected explanation and his attempt to prove there was no partnership merely exacerbated the gravity of the findings on the charges."

Petitioner attempts to circumvent the holding in *Flannery,* which is controlling in the proceeding at bar, and in his petition gives a distorted and factually incorrect portrayal of the record below. In short, the arguments set forth by the petitioner are without merit.

Upon the evidence adduced, the Referee sustained all ten charges in the petition. The Appellate Division confirmed the findings of the Referee. All of the charges are, individually, extremely serious in nature. Cumulatively taken, the charges are of the utmost gravity. A recapitulation of the charges, with disposition, is as follows:

Charge No. 1 (Setting up Tow Trucker in business and payment for cases solicited) Sustained;

Charge No. 2 (Solicitation of specific cases) Eleven specifications sustained;

Charge No. 3 (False information as to Referrers) Eight specifications sustained;

Charge No. 4 (False medical bills) Seven specifications sustained;

Charge No. 5 (Building up and exaggerating personal injury claims) Nine specifications sustained;

Charge No. 6 (False bills of particulars) One specification sustained;

Charge No. 7 (False statements of loss of earnings) Two specifications sustained;

Charge No. 8 (Blank retainer agreements) Thirteen specifications sustained;

Charge No. 9 (Compromise of infants' claims without a Court order) Three specifications sustained;

Charge No. 10 (Failure to maintain a special bank account, and failure to give clients copy of Closing Statements) Sustained in both respects.

In reviewing the findings of the Referee in the instant proceeding, the Appellate Division stated (p. 117):

> "Severally, these charges would constitute professional misconduct. In their cumulative effect, they represent a pattern of misconduct which calls for severe discipline. Respondent's disingenuous attempt to avoid responsibility by claiming that the firm of Fata & Fata was not a partnership but some sort of joint venture was ineffectual and properly rejected by the Referee. Respondent must share the burden of responsibility for the acts of his partner even though he claims he had no actual knowledge of some of the acts. (See *Matter of Gladstone,* 16 A. D. 2d 512, 516; leave to appeal denied, 12 N. Y. 2d 644; *Matter of Shields,* 16 A. D. 2d 50, 51-52; leave to appeal denied, 11 N. Y. 2d 648; *Matter of Weitz,* 11 A. D. 2d 76, 77; aff'd 9 N. Y. 2d 735.)"

Petitioner in his brief (p. 7) cites *Matter of Kiley,* 22 A. D. 2d 527 and states that *Kiley* is "much closer on its facts to our situation." This is not so. The respondent,

Donald Kiley, joined his older brother in the practice of the law after the older brother's negligence practice, built up over several years, had assumed such proportion that the elder Kiley decided to take his brother as a partner. This was the case of a younger brother, inexperienced in the negligence field, becoming the partner of a seasoned negligence practitioner. The Fata & Fata situation is patently different. Petitioner and his brother, Francis, were admitted to the bar on the same day (October 21, 1954) and immediately started practice in the negligence field, as partners. It is significant that the earliest act of misconduct alleged in the petition to have been committed in May, 1955 and sustained by the Referee, arose in the Fulton Wilson specification (see Petition, Charges 5 and 6). Almost from the beginning of the partnership, the petitioner and his brother embarked on a career of misfeasance that led to the resignation of one brother and the disbarment of the other.

Corrections of Statements of Fact Made by Petitioner

In the petition, page 5, it is stated that Charges 8, 9 and 10 were considered by the Appellate Division and the Court of Appeals to be "lesser offenses." There is nothing in the Appellate Division's opinion to support this statement, and the Court of Appeals did not write an opinion. Petitioner's assumption that the Court considers the systematic violation of its mandates as "lesser offenses," is so unwarranted and gratuitous that it verges on the ridiculous.

On pages 6 and 7 of the petition, there is an analysis of the number of statements of retainer filed by Fata & Fata. There is nothing in the record to justify this analysis, and

the petitioner admits that it was omitted from the record. The petition, at page 7, asserts that "the retainers were not available for examination by the petitioner." This is not so. The statements of retainer were available for petitioner's examination at the office of the Co-ordinating Committee at all times.

No valid reasons exist for granting petitioner's application. It is respectfully submitted that the unanimous decision of the Appellate Division, sustaining the findings of the Referee, was not arbitrary. An examination of petitioner's brief in support of the instant application clearly shows that it is devoid of any *bona fide* question which calls for the review of this honorable Court.

CONCLUSION

The petition for certiorari should be denied.

Dated: September, 1965

Respectfully submitted,

ANGELO T. COMETA,
Attorney for
Co-ordinating Committee on
Discipline, Respondent.